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IN THE

Supreme Court of the United States

1973 TERM

No. 73 427

In the Matter of the Application of

DIANE BERNI, BARBARA D. HAHN, DONNA M. MARSH, LOIS NEWMAN, CAROL RYDER, and all those similarly situated,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Petitioners,

— against —

ADELE LEONARD, Executive Directrix of the Nassau County Civil Service Commission and the Nassau County Civil Service Commission, and LOUIS J. FRANK, Commissioner of Police of the County of Nassau and the POLICE DEPARTMENT OF THE COUNTY OF NASSAU,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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POINT I

Petitioners are not qualified to take the promotional examination for police sergeant on the basis that they lack the required qualifications and experience of patrolmen.

In their petition to this court, petitioners attempt to make out a case that there has been a deprivation of a

constitutional right. On this point, petitioners differ from the learned judges in the courts below who have ruled in this matter. It is respondents' position, as well as that of every court below, that there is only one real question presented by this case: Are petitioners, in fact, qualified to take the promotional examination and serve in the position of Police Sergeant?

Petitioners state that the Police Department of Nassau County must recognize the civil rights of all of its members. *Mize* v. *State Division of Human Rights,* 38 A.D. 2d 278 (4th Dept., 1972). With this, respondents are in complete agreement, for it is respondents' position that in no way have petitioners' civil rights been violated.

To strengthen their position, petitioners stress the intent of the New York State law that guarantees the opportunity to obtain employment without discrimination because of sex. Executive Law §291. But, what is involved in the case at bar is an important exception to the law. When a particular sex is a "bona fide occupational qualification" for a position, then employment lines can be drawn to include that sex alone. Executive Law §296 (1)(d); see Civil Service Law §50(7); 42 USC §2000e-2(e). The respondents, and all of the courts below, agree that the job classifications involved are reasonably drawn with respect to the required experience and ability necessary to perform in the position of Police Sergeant.

A major qualification and requirement to take the Police Sergeant promotional examination is four years experience as a patrolman. Petitioners do not meet this requirement. Because they lack this requisite "seasoning" from on-the-job experience, petitioners have not been permitted to take the promotional examination for Police Sergeant.

The duties and responsibility of a patrolman are markedly different from those duties to which petitioners have been assigned. The routine duties of a Patrolman

include responding to general calls in family disturbances, fights, stickups, homicides, automobile accidents, making arrests and preserving the public peace. A Patrolman may be assigned to act as a service monitor, operate emergency equipment, enforce vehicle and traffic laws and "walk the beat". Patrolmen, in most cases, must work "around the clock" in rotating shifts. On the other hand, the petitioners' experience has been limited to investigative services addressed primarily to women and minors. In commenting upon the drastic differences between the duties of a Patrolman and a Policewoman, the court below, in *Matter of Berni* v. *Leonard*, 69 Misc. 2d 935, 936-937, observed:

> "It is reasonable to provide that a sergeant charged with the duty of supervising patrolmen should have experience *in the very operation he must supervise.* None of the women have this experience, not unremarkably since those duties have been exclusively reserved for men. Apparently, the women have not formally complained about being excluded from performing the duties of patrolmen; yet, because of the missing job experience, they now lack an essential *bona fide* job qualification for supervising patrolmen. The court finds, therefore, that restricting the job of a police sergeant to patrolmen does not violate the Executive or Civil Service Laws and is reasonable under the Fourteenth Amendment to the United States Constitution."

Contrary to petitioners' allegation, it is not arbitrary and capricious to require Patrolman's experience for a supervisory position which requires an intimate knowledge of a Patrolman's activities. Petitioners are not, as they allege, being excluded on the basis of sex. Petitioners admit that they do not have the experience a Patrolman gains while on the job. One can hardly say, therefore, that classifying them as unqualified is discriminating—rather,

it is in the stream of standard promotional procedure.

All the courts below have held, and respondents now contend, that petitioners have not been denied equal protection under the laws on the basis of the sexes. The plain truth is that petitioners, on the basis of traditional standards of merit and fitness, do not qualify for the position of Police Sergeant.

When an applicant does not qualify for the position he seeks, New York law gives the Civil Service Commission involved the right to exclude such person from the examination for that position. Civil Service Law §50(4)(a) provides as follows:

> "§50(4) Disqualification of applicants or eligibles. The State Civil Service Department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible
> "(a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies...."

The right of civil service commissions to establish reasonable requirements for a particular position is undisputed. As the court stated in *Fitzgerald* v. *Conway*, 275 A.D. 205, 209 (1949), *leave to appeal den.*, 299 N.Y. 798:

"The preparation and conduct of civil service examinations are administrative functions vested in the Civil Service Commission. In the exercise of these functions the commission has broad discretionary powers to determine, among other things, all matters relating to the time and place of the examination; the selection of questions to be used; the manner of conducting the tests; the relative values to be given to different sections of the tests; whether the examination shall be open or promotional and the preliminary requirements and subjects of the examination. So long as these discretionary powers are fairly and reasonably exercised the court will not intervene to substitute

its judgment for that of the commission. It is only when such powers have been unreasonably and arbitrarily used, or exercised in violation of some constitutional or statutory provision, that the intervention of the court may be successfully invoked."

The respondents respectfully submit that there has been no showing on petitioners' part that the discretionary powers of the Nassau County Civil Service Commission have been unfairly and unreasonably exercised so as to require a court to substitute its judgment for the judgment of the Commission. In support of this proposition, the Court of Appeals, in *Matter of Wirzberger* v. *Watson*, 305 N.Y. 507, 513 (1953), stated:

> "The decisional law on the problem is that the Commission's fixing of the minimum requirements for admission to an examination is not to be interfered with by the courts if any fair argument can be made to sustain its action, '* * * even though they may differ from the commission as to its advisability." (*People ex rel. Moriarty* v. *Creelman*, 206 N.Y. 570, 575-576; *People ex rel. Schau* v. *McWilliams*, 185 N. Y. 92, 99; *Matter of Laverty* v. *Finegan*, 249 App. Div. 411, affd. 275 N. Y. 555; *Matter of Davis* v. *Wiener*, 260 App. Div. 127, aff'd. 285 N. Y. 537; and see *Matter of Murray* v. *McNamara*, 303 N. Y. 140, 144.)

Petitioners allege that the "bona fide occupational qualification" established by respondents is irrational in that a Patrolman assigned to specialized duties is permitted to take the examination for Police Sergeant. Respondents wish to emphasize the fact that virtually every individual holding the rank of Patrolman has had at least minimal experience with routine police duties. In contrast to this, none of petitioners has had, at any time, any experience with routine police work whatsoever.

The petitioners rely on the case of *Matter of Shpritzer* v. *Lang*, 17 A.D.2d 285, *aff'd.*, 13 N.Y.2d 744 (1964), in support of the proposition that the New York City Police Department must allow women as well as men to take promotional examinations for Police Sergeant. But it is submitted that that case is clearly distinguishable from the case at bar. In *Shpritzer*, women were allowed to hold only one rank within the department—that of Policewoman, and therefore there was no possibility of promotion to higher rank. Also, in the New York City Police Department, Policewomen are involved in a significantly broader policing function than in the Nassau County Police Department. In the present case, there is a rank of Policewoman Sergeant, as well as a test to provide an opportunity to achieve said rank. Indeed, petitioners were eligible for and could have taken Promotion Examination No. 75-520, Policewoman Sergeant, on April 29, 1972. It can, therefore, be seen that petitioners, unlike the petitioners in *Shpritzer*, were not denied promotional opportunities solely because of sex.

Finally, we must mention that the New York State Legislature has recently amended the Civil Service Law and the Executive Law (see Chapter 66, Laws of New York, 1973). These amendments include women within the existing police appointment requirements applicable only to men in the past. The result of these changes will be that women will have the opportunity to serve in the rank of Patrolman in the Nassau County Police Department. This, in turn, will provide them with the required experience and training to qualify to take the promotional test for Police Sergeant. Unlike petitioners in the present case, these women holding the rank of Patrolman will completely meet the qualifications to take the test for Police Sergeant and then serve in that capacity if so appointed.

CONCLUSION

For the reasons stated above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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